Joseph Hagins and Linda P. Szymoriak-Hagins, d/b/a His and Hers Beauty Spa *and* United Food and Commercial Workers, Local 455, affiliated with United Food and Commercial Workers International Union. Cases 16–CA–028076 and 16–CA–062829

September 11, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file a legally sufficient answer to the complaint. Upon charges filed by United Food and Commercial Workers, Local 445 (the Union),[1] the Acting General Counsel issued a consolidated complaint on December 29, 2011, against Joseph Hagins and Linda Szymoriak-Hagins, d/b/a His and Hers Beauty Spa (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Copies of the charge and complaint were properly served on the Respondent.

On January 19, 2012,[2] the Region advised the Respondent that it had failed to file an answer to the consolidated complaint and extended the time for filing an answer to January 26. The Region advised the Respondent that if an answer was not filed by that time, a motion for default judgment would be filed. The Respondent failed to file an answer and, on February 9, 2012, the Acting General Counsel filed a Motion for Default Judgment.

On February 10, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On or about February 21, the Respondent, by Joseph Hagins, filed a letter with the Board, stating that it opposed "any hearings to be transferred to Washington" based on the Hagins' "current Bankruptcy . . . status." The letter also indicated that the bankruptcy attorneys retained by Joseph Hagins had "failed to respond" to the Region, causing the Respondent to miss the deadlines for filing an answer. Finally, the letter stated that Joseph Hagins had "involved other agencies" in an attempt to "get [his] attorneys to be more compliant to my assistance" and requested that the Board serve his bankruptcy attorney with, and copy "Linda Szymoniak-Hagins"[3] on, all future correspondence. The Respondent did not serve this letter on the Union, the Acting General Counsel, or the Region.

On July 17, the Board notified Antonio Martinez, the bankruptcy attorney referenced in the Respondent's letter, that the Respondent's letter was not properly served on all the parties. It further advised that unless the letter was served to the Region and the Union by July 31, the Board would issue a Decision and Order granting the Motion for Default Judgment. On or about July 29, the Respondent served the Region with a copy of its February 21 letter. On or about August 10, the Union's attorney advised the Region that he had received the Respondent's letter on or about July 28.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that an answer must be received on or before January 12, and that if no answer is filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated January 19, notified the Respondent that unless an answer was received by January 26, a motion for default judgment would be filed.

As described above, the Respondent, on or about February 21, submitted a letter to the Board stating, in relevant part:

> We oppose any hearings to be transferred to Washington in regards to [this case]. The reasons for opposing this transfer and any other proceeding in this matter or against Linda Szymoniak Hagins or myself is due to our current Bankruptcy (10-10679) status, and can not afford such traveling expenses. . . . Though I had been informed by my attorney that creditors are not to harass or attempt to collect on debts, while one is in bankruptcy, I continuously received emails and letters from the office of Mrs Ziegler. [ ] I attempted to respond to the NLRB letters and emails sent by Mrs Ziegler the best to my knowledge, but then instructed her to please contact my Bankruptcy attorneys. My attorneys failed

[1] The charge in Case 16–CA–028076 was filed on June 22, 2011, and amended on August 24, 2011. The charge in Case 16–CA–062829 was filed on August 17, 2011.

[2] All dates are in 2012 unless otherwise indicated.

[3] We note that the last name of Respondent Linda Syzmoriak-Hagins is spelled differently in the Respondent's letter than in the other papers filed in this case. Although we acknowledge the likelihood that the letter reflects the proper spelling of her name, we are bound by the papers filed by the Acting General Counsel.

> to respond to her calls and emails, so therefore deadlines for responses that were set by the NLRB were not met. My calls and emails were also not answered by my attorneys . . . .

Although the Respondent appears to have retained bankruptcy counsel, we note that the letter at issue was submitted pro se. In determining whether to grant a motion for default judgment on the basis of a respondent's failure to file a sufficient or timely answer, the Board typically shows some leniency toward respondents who proceed without benefit of counsel. See, e.g., *Clearwater Sprinkler System*, 340 NLRB 435 (2003). Indeed, the Board generally will not preclude a determination on the merits of a complaint if it finds that a pro se respondent has filed a timely answer that can reasonably be construed as denying the substance of the complaint. Id.

Here, the Respondent's letter cannot reasonably be construed as denying the substance of the consolidated complaint's factual allegations. Although the letter cites the Respondent's bankruptcy status for its noncompliance with the Board's deadlines, it is well established that bankruptcy does not relieve a respondent of the obligation to file an answer. *OK Toilet & Towel Supply*, 339 NLRB 1100, 1101 (2003*); Miami Rivet of Puerto Rico*, 307 NLRB 1390, 1391 fn. 2 (1992). The letter also asserts that Board deadlines were not met as a result of ineffective assistance of counsel. The Board has recognized, however, that a claim that counsel was delinquent in reviewing a case is not sufficient to establish good cause for the purpose of avoiding default judgment. *Sherwood Coal Co.*, 252 NLRB 497, 497 (1980); see generally *Bricklayers Local 31*, 309 NLRB 970, 970 (1992). Accordingly, we find that the Respondent's letter does not constitute a sufficient answer under Section 102.20 of the Board's Rules and Regulations.

In the absence of good cause being shown for the lack of a legally sufficient answer, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a sole proprietorship, with a place of business at Randolph Air Force Base (AFB) in San Antonio, Texas, has been engaged in the business of providing beauty salon services to members of the armed forces and their dependents. During the 12-month period ending October 31, 2011, a representative period, the Respondent provided services valued in excess of $50,000 from its San Antonio, Texas facility to the Federal Government.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On or about December 2008, the Respondent assumed the business of Gino Morena Enterprises, here called GME, by federal contract, and until November 18, 2011, has continued to operate the business of GME in basically unchanged form, and employed as a majority of its employees individuals who were previously employees of GME. Based on the operations described above, the Respondent has continued as the employing entity and is a successor of GME.

At all material times, Cindy Boudloche has been designated by the bankruptcy court of the Southern District of Texas, Brownsville Division, as the standing trustee in Chapter 13 bankruptcy of the Respondent, with full authority to exercise all powers necessary to the administration of the Respondent's business in relationship to the resolution of the bankruptcy proceedings.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Joseph Hagins	Owner/Manager
Linda Szymoriak-Hagins	Owner/CEO

The following employees of the Respondent (theunit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All beauticians employed at the Randolph Air Force Base Beauty Shop.
>
> Excluded: All other employees, including base manager, guards, and supervisors as defined in the National Labor Relations Act.

On or about December 2008, the Respondent assumed a government contract subject to the provisions of the McNamara-O'Hara Service Contract (SCA), which was previously awarded to GME. Since December 2008 and at all material times, the Respondent has continued to perform the services specified in GME's contract in basically unchanged form, and employed employees previously employed by GME. Based on the operations described above, at all material times the Respondent was the employing entity and a successor to GME. Since December 2008, and at all material times, based on Sec-

tion 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the unit as described above.

On or about May 27, 2011, the Union, in writing, requested that the Respondent furnish the Union with the following information:

(a) all the employees working in the shop in 2011;
(b) their job classification;
(c) their commission rates;
(d) the amount paid for each pay period; and,
(e) their dates of employment with the Respondent.

The information requested by the Union, as described above, is necessary for and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since about May 27, 2011, the Respondent failed and refused to timely furnish the Union with the information requested by it as described above. On or about August 2, 2011, the Respondent supplied the information requested.

On or about March 7, 2011 through November 18, 2011, the Respondent changed employees' compensation by decreasing pay for new hires from a 56-percent commission rate to a 50-percent commission rate. The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

By the conduct described above, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to timely furnish the Union with information that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit and the Respondent, on or about March 7, 2011 through November 18, 2011, changed employees' compensation by decreasing pay for new hires from a 56 percent commission rate to a 50 percent commission rate. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent, on or about March 7, 2011 through November 18, 2011, unlawfully changed employees' compensation by decreasing pay for new hires from a 56 percent commission rate to a 50 percent commission rate, we shall order the Respondent to rescind the change in the terms and conditions of employment for its unit employees and make the unit employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Finally, any amounts to be reimbursed under our Order are to be with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Joseph Hagins and Linda P. Szymoriak-Hagins d/b/a His and Hers Beauty Spa, Universal City, Texas and San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain with the Union by failing and refusing to timely furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on or about March 7, 2011 through November 18, 2011.

(b) Make whole bargaining unit employees whose commission rate was decreased from 56 percent to 50 percent for all losses they suffered as a result of the Respondent's unlawful unilateral change, plus interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in

Kentucky River Medical Center, 356 NLRB No. 8 (2010).

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in San Antonio, Texas, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 11, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain with the Union by failing and refusing to timely furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

WE WILL NOT change the terms and conditions of employment of our unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the change in the terms and conditions of employment for our unit employees that was unilaterally implemented on or about March 7 through November 18, 2011.

WE WILL make whole bargaining unit employees whose commission rate was decreased from 56 percent to 50 percent for all losses they suffered as a result of our unlawful unilateral changes, plus interest.

JOSEPH HAGINS AND LINDA P. SZYMORIAK-HAGINS, D/B/A HIS AND HERS BEAUTY SPA